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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1213.

ROY E. AMMOND,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY
and
H. F. EMERSON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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OPINIONS BELOW.

The district court did not render a written opinion. Its judgment is copied in the record at page 33. The opinion of the Circuit Court of Appeals (R. 68-75) is reported in 125 F. (2d) 747.

JURISDICTION.

The judgment of the court below was entered on February 10, 1942 (R. 67). The petition for writ of certiorari was filed May 4, 1942. Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended. 28 U. S. C. § 347(a).

QUESTION PRESENTED.

May a Federal District Court enjoin the enforcement of a default judgment rendered in a state court after removal had been perfected and jurisdiction had been assumed by denial of a motion to remand, and while an ancillary petition to enjoin proceedings in the state court and an answer thereto were pending in the District Court?

STATUTES INVOLVED.

The statutes are printed in the appendix.

STATEMENT.

Petitioner, a resident of Ohio, commenced this suit against respondents, a Pennsylvania corporation and a resident of Ohio, in the Court of Common Pleas of Stark County, Ohio, on March 24, 1939. The complaint alleged that owing to the negligence of the respondents, petitioner had suffered injuries in a collision between an automobile in which he was riding as a passenger and a train of respondent railroad company which was in the control of its engineer, respondent Emerson (R. 3-7). On April 19, 1939, respondent railroad company filed in the Court of Common Pleas of Stark County a petition and bond for removal to the proper federal district court, alleging in substance that it was a non-resident and that a separable controversy was involved as to it (R. 9-12). Two days later the petition for removal was denied (R. 12). Respondent railroad company thereupon removed the cause to the proper federal district court, and on May 4, 1939 filed its answer to the complaint (R. 14-16). Neither respondent appeared or pleaded in the state court. Petitioner moved to remand the cause to the state court (R. 19). The motion was denied on September 21, 1939 (R. 20).

On October 27, 1939, more than a month after the motion to remand was denied, petitioner filed in the state court a motion for judgment (R. 60). On November 15, 1939,

respondent railroad company filed in the district court an ancillary complaint in which it prayed that an injunction issue restraining petitioner from proceeding in the state court (R. 20-23). Petitioner filed an answer to the ancillary complaint (R. 24-26) and two months later, on January 23, 1940, a demand for a jury trial in the district court (R. 36).

On March 19, 1940, six months after petitioner's motion to remand had been denied and at a time when both the principal and the ancillary causes were at issue in the federal district court, petitioner, in an ex parte hearing in the state court, took a verdict of a jury for $35,000, the amount prayed in the complaint (R. 60). Four days later judgment was entered on the verdict (R. 60). It was conceded in the court below that at the time judgment was entered, the state court had no knowledge of the orders or rulings of the federal district court (R. 69). Execution issued on the judgment on April 16, 1940 (R. 36, 60) and six days later respondent railroad company filed a supplement to the ancillary complaint to enjoin its enforcement (R. 26-27). An order to show cause issued on May 2, 1940 (R. 32) and on July 10, 1940, after the hearing set forth in the record at pages 38-58, the federal district court issued an injunction restraining further proceedings in the state court (R. 33-34).

From the order granting this injunction petitioner appealed and on February 10, 1942, the judgment of the district court was unanimously affirmed (R. 67). The petition for certiorari is addressed only to this judgment.

ARGUMENT.

The only question is whether the district court properly enjoined enforcement of the state court judgment which was rendered after the cause had been removed to the district court and that court had denied a motion to remand and had assumed jurisdiction. Petitioner attacked

the injunction on the single ground that the district court was without jurisdiction of the principal case because an Ohio statute, claimed to have been construed by the Common Pleas Court of Stark County at the time it denied removal, established joint liability of the respondents and therefore negatived the existence of a separable controversy between petitioner and respondent railroad company. Apart from the fact that the state court did not construe the statute as petitioner claims, there are at least four reasons why the contention is unsound.

1. Under Ohio law a master and servant may not be joined in the same action where the liability of the former rests on the principle of *respondeat superior*. *Clark v. Fry*, 8 O. S. 358, 377; *French v. Central Construction Co.*, 76 O. S. 509, 518; *Losito v. Kruse*, 136 O. S. 183, 187; *Herron v. Youngstown*, 136 O. S. 190, 196. That has been the unvarying rule in Ohio since 1858 (*Clark v. Fry, supra*), and as recently as 1940 the Ohio Supreme Court stated in *Losito v. Kruse* that in such cases "there can be no joinder in a single action of the party primarily liable and the party secondarily liable because there is no joint liability. If they are joined in an action and this relationship appears on the face of the petition, it is demurrable for misjoinder of parties defendant" (p. 187). The rule thus stated by the Ohio Supreme Court is followed in Ohio cases by the federal courts of the Sixth Circuit. *Galehouse v. Baltimore & Ohio R. Co.*, 274 Fed. 370; *Robbins v. Pennsylvania Co.*, 245 Fed. 435.

Section 8856[1] of the Ohio General Code does not make the rule inapplicable here. All of the decisions cited above and in the petition have regarded the rule as applicable

[1] Sec. 8856. Liability of company. The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person.

generally in cases involving the liability of master and servant and none has excepted the case where the liability of a railroad company and its engineer is concerned. Indeed, the *Robbins* and *Galehouse* decisions are applications of the rule to cases involving that precise situation and the opinions represent interpretations "placed upon purely local law by an (Ohio) federal judge of long experience and by three circuit judges whose circuit includes (Ohio)." *MacGregor v. State Mutual Life Assurance Co.*, No. 179 decided February 16, 1942. Moreover, neither opinion even mentions the section although it had then been in force for many years.

Section 8856 does not state that the railroad company and the engineer shall be "jointly liable." When the legislature has intended that result it has expressly provided for it,[2] just as it has expressly provided for procedural joinders in another part of the code. § 11255. The section must be examined in connection with Sections 8853 and 8855. Such an examination discloses that Sections 8853 and 8855 were intended to impose certain duties and a penalty on engineers who were employees of railroad companies, and that Section 8856 was added to forestall the contention that by implication the engineer and the employer railroad company were therefore not liable in damages. The choice of the phrase—"the company • • • as well as the person himself, shall be liable in damages"—is ample evidence that that section was not intended to have any other effect.

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[2] Proof that the legislature knew how to draw a section providing for joint liability is Section 8814. It reads: "Notwithstanding such lease the corporation of this state lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee *shall be jointly liable* upon all rights of action accruing to any person for negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith, and may be jointly sued in the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability. Service may be had upon such companies, or either of them by the service of process upon any officer or agent of either of the companies." (Emphasis added.)

Sections 8853 and 8856 were enacted in 1872 (69 O. L. 49; Rev. Stat. §§ 3336, 3337) and so far as relevant here have remained unchanged since that date. Undoubtedly there have been many cases involving the liability of a railroad company and its engineer under Sections 8853, 8855 and 8856 since they were first enacted, but petitioner concedes (Br. 14) that Section 8856 has never been construed at all, much less construed to exclude such cases from the rule in respect of joinder announced in *Clark v. Fry*, 8 O. S. 358. In fact, so far as reported cases and the recollection of counsel extend, no one has ever advanced such a contention until petitioner pressed it here.

2. The order denying removal entered by the Court of Common Pleas of Stark County (R. 12) cannot be regarded as authority for petitioner's construction of Section 8856. Nor can it be regarded, despite contrary assertions in the petition, as a decision construing a state statute which a federal court would be bound to follow under the principles of *Swift v. Tyson*, 16 Pet. 1; *Erie R. Co. v. Tompkins*, 304 U. S. 64; and *West v. A. T. & T. Co.*, 311 U. S. 223. That order recited merely that "said petition is denied" (R. 12). The state court did not file an opinion and nothing in the record indicates the reason for the state court's decision. From all that appears, removal may have been refused on the theory that the removal statute (28 U. S. C. § 71) was unconstitutional.

3. The decision by the court below was not in conflict with *Metropolitan Casualty Insurance Co. v. Stevens*, 312 U. S. 563, or *Yankaus v. Feltenstein*, 244 U. S. 127. In neither of those cases did the federal district court assume jurisdiction, but rather both *granted* the motion to remand. This Court necessarily regarded the causes as improperly removed since judicial review of the remand order was precluded by Section 28 of the Judicial Code. See *Kloeb v. Armour & Co.*, 311 U. S. 199; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374. In that view of

the cases, it followed that the state courts had jurisdiction to enter default judgments. Here the district court *denied* the motion to remand and assumed jurisdiction. For reasons already stated, it is apparent that there was a separable controversy and therefore that the action of the district court was proper. It follows that the state court was without jurisdiction to enter the default judgment which petitioner subsequently obtained.[3] *Iowa Central Ry. Co. v. Bacon*, 236 U. S. 305; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Virginia v. Rives*, 100 U. S. 313; *Gordon v. Longest*, 16 Pet. 97. It is reasonable to suppose that the judgment would never have been entered had petitioner remedied the court's conceded (R. 69) lack of information concerning the rulings of the federal court.

4. The injunction restraining enforcement of the state court judgment was an appropriate and authorized method of protecting respondents and the jurisdiction of the district court. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Dietzsch v. Huidekoper*, 103 U. S. 494. Its issuance was not prohibited by Section 265 of the Judicial Code (*Dietzsch v. Huidekoper, supra*), and during this Term this Court has expressly recognized the propriety of such an injunction. *Toucey v. New York Life Insurance Co.*, 314 U. S. 118, 133.

5. In any event, and apart from the arguments previously advanced, the judgment of the court below must be affirmed. The propriety of the injunction, the only subject of dispute on this petition, does not depend on the existence or non-existence of jurisdiction of the cause which was removed. *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207; *United States v. Shipp*, 203 U. S. 563; *In re Metropolitan Trust Co.*, 218 U. S. 312; *Holm v. Hickory Cane Mining Co.*, 36 F. Supp. 441; *Webb v. Southern Ry.*

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[3] If the necessary papers and a proper petition and bond for removal are filed, "it shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit." Judicial Code § 29; 28 U. S. C. § 72.

Co., 235 Fed. 578; *Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718; *McAlister v. Chesapeake & Ohio Ry. Co.*, 157 Fed. 740. The district court necessarily had power to determine whether or not it had jurisdiction[4] (*Chesapeake & Ohio Ry. Co. v. McCabe, supra; United States v. Shipp, supra; In re Metropolitan Trust Co., supra*) and once it had done so it was authorized to prevent petitioner from flouting that determination and compelling respondents to conduct the litigation on two fronts. Any other conclusion would make it impossible for removing defendants to rely upon a federal court's acceptance of jurisdiction and would encourage in plaintiffs an unwholesome disregard for its orders.

CONCLUSION.

Under the law of Ohio respondents were not jointly liable and there was therefore a separable controversy between petitioner and respondent railroad company which was properly removed to the district court. Section 8856 of the Ohio General Code does not affect that conclusion. Apart from these considerations the injunction was proper in any event since its propriety does not hinge on jurisdiction of the principal cause. The decision below is not in conflict with decisions of this Court or of other federal courts, and the questions presented, even if important, were plainly decided correctly. Accordingly, the petition should be denied.

Respectfully submitted,

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[4] "It is not necessary to determine whether the case was removable or not. The Federal court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this court." *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 222.